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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No._____

IVAN E. OAKES, as Receiver,

Petitioner,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

Respondent.

PETITION FOR WRIT OF CERTIORARI:

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Ivan E. Oakes, a citizen of the State of Oregon, respectfully shows:

A—SUMMARY STATEMENT OF MATTERS INVOLVED

That herein, the Circuit Court of Appeals for the Ninth Circuit has held that one who had been duly appointed a managing and operating receiver of certain properties, including cattle, involved in a chattel-

mortgage foreclosure suit pending in an Oregon court of admitted jurisdiction, and who had, in Oregon, taken the cattle into his custody, control and possession, and who, by his bond as Receiver, is obliged to account for all properties coming into his hands as Receiver, has no right to bring his action for the repossession or value of said cattle in the United States District Court in Idaho, it appearing that, without his knowledge or consent, the cattle had passed from Oregon into Idaho, where they had been attached as the property of the chattel-mortgagor.

The matters involved are the property rights or title, of an Oregon receiver, to movable chattels under the facts related; and the personal right to possession of chattels by one who, as an Oregon receiver, within that State, had assumed control and taken custody thereof, and who is personally liable on his bond for property so taken into his hands, when, thereafter, as here, the chattels (cattle on the range) have passed from Oregon into Idaho as already related.

Generally, they involve the possessory or property rights of one who is a managing receiver of a business enterprise, to repossess himself or recover the value, in a foreign State, of those chattels which had been taken into his possession as such receiver within the appointing State, but which had thereafter passed into a sister State.

B—REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The following reasons are relied on by petitioner:

1. That the decision herein of the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of the Circuit Court of Appeals in the Seventh Circuit and of the Court of Appeals of the District of Columbia, and with earlier decisions of its own, dealing with the same or kindred matter.

Thus in the Seventh Circuit it was held in *Chicago Bonding & Surety Co. v. United States* (1919) 261 Fed. 266, that (the case being so regarded) a Pennsylvania receiver, who had shipped goods from Pennsylvania into Illinois, might sue and recover damages in Illinois as the owner of the goods furnished and not as receiver of a chose in action belonging to the company in receivership.

Further, *Jenkins v. Purcell* (1907), 29 App. D. C. 209 allowed a Virginia receiver to intervene in, litigate and successfully claim his right to funds attached in the District of Columbia in an action brought by a creditor of the former owner of cattle which had been placed in the hands of the Virginia receiver in Virginia, who brought the cattle into Washington and sold them, the proceeds being the funds attached in the buyer's hands.

The question was similarly decided in the Ninth Circuit in *The Willamette* (1895) 66 Fed. 565, where

an Oregon receiver, managing and operating a steamship, which was seized on admiralty process in the Northern District of California, was permitted to appear and litigate in the foreign admiralty court. His right to take the vessel was denied since the libel was based on liabilities incurred by the receiver in his own operation, but his capacity to sue was not proscribed; and, later on, he was in the District Court permitted further to litigate, and to share in the distribution of the vessel's proceeds after sale, wherein his right as a foreign receiver to participate and litigate was resisted. (*The Willamette Valley* (1896) 76 Fed. 838, 852.)

2. Herein the court has decided important questions of general law in denying to a managing receiver of goods and chattels involved in a foreclosure proceeding and by him reduced to possession, the right or capacity to sue in a foreign state for their recovery or value when brought therein without his knowledge or consent, and denying that his possessory rights or title to such chattels will be there recognized; that such decision is probably untenable and is in conflict with the weight of authority.

For example, *McAlpin v. Jones* (1855), 10 La. Ann. 552, held that a Mississippi receiver might recover, in the Louisiana Courts, possession of four slaves stolen from him in Mississippi; in *Cagill v. Wooldridge* (1875) 8 Baxt. (Tenn.) 580, an Arkansas receiver was permitted to replevy cotton sent by him from Arkansas into Tennessee where it was attached by a creditor of the insolvent; in *Pond v.*

Cooke (1877), 45 Conn. 126, a New Jersey receiver, who had purchased iron with receivership money and had shipped it into Connecticut, was permitted to recover it from an attaching creditor of the insolvent; in *Chi. M. & St. P. Ry. v. Keokuk Packet Co.* (1884), 108 Ill. 317, a Missouri receiver recovered possession of a barge against an Illinois attaching creditor of the insolvent, it appearing that, in Missouri, the receiver had leased the barge to one who took it into Illinois and while therein relinquished its possession to the receiver; in *Robertson v. Staed* (1896), 135 Mo. 135, a Mexican railroad receiver prevailed in replevin against a Missouri sheriff who had attached a special railroad-car at the suit of an Illinois creditor of the railroad suing in Missouri, it appearing that the car had been brought by the receiver from the Republic of Mexico into Missouri; In *Woodhull v. Farmers Trust Co.* (1902), 11 N. Dak. 157, an Iowa receiver was allowed to recover possession of certain promissory notes brought lawfully by him into North Dakota, where the notes were attached by a North Dakota creditor of the insolvent; in *Somerset Coal Co. v. Diamond Steel Co.* (1909), 224 Pa. 217, a Delaware receiver had sent moneys from Delaware into Pennsylvania, which were attached in an action brought by a Pennsylvania creditor against the insolvent. Held that the moneys belonged to the receiver and the attachment was discharged. In *Merchants Bank v. Penna. Steel Co.* (1894), 57 N. J. L. 336, a Pennsylvania receiver, operating the business, sold and shipped goods from Pennsylvnia to a New Jersey

customer whose debt on account thereof and certain goods were attached in a New Jersey action brought by a Massachusetts creditor against the insolvent. Held, that the receiver had title and the attachment was discharged.

The federal cases of *The Willamette Valley*, 66 Fed. 565, *Chicago Bonding Co. v. U. S.*, 261 Fed. 266, and *Jenkins v. Purcell*, 29 App. D. C. 209, are in accord; and the important case of *Crapo v. Kelly* (1872), 16 Wall. (83 U. S.) 610, involving the possessory rights of a Massachusetts assignee in insolvency proceedings, relating to a vessel on the high seas, but attached by a New York creditor of the insolvent on its arrival in that state, is in harmony.

The only case found in support of the decision herein is *Humphreys v. Hopkins* (1889), 81 Cal. 551 (where a strong dissenting opinion was expressed by two of the justices).

3. That the legal capacity to sue in a federal court by one who is a foreign receiver, seeking to recover possession or the value of goods which had been by him taken into actual possession within the jurisdiction of the appointing state, but thereafter sent by him for a lawful purpose, or taken without his knowledge or consent, into a sister state and there adversely held as the property of another, presents a question of importance in federal jurisprudence, closely allied to if not genuinely a federal question, which has not been, but should be settled by this court.

This court has settled the law that a foreign receiver, in the absence of assignment or conveyance to him, or applicable statute vesting title in him, may not bring his action for recovery of property or the enforcement of a chose in action in the federal courts of a sister state, the property or property rights being *within the sister state;* but the property rights, "special property" of one who is a foreign receiver, and who has, *within the state of his appointment,* actually assumed management and taken possession of the goods and chattels of an insolvent or other former owner of receivership assets, which goods have thereafter been brought into a sister state, wherein such rights must be adjudicated, either by the receiver as such, or individually based upon his responsibility therefor, have not been settled by this court.

His title, which closely resembles that of a bailee, has been respected by some courts as akin to a judicially determined right entitled to full faith and credit. See *Woodhull v. Farmers Trust Co.,* 11 N. Dak. 157; also *Robertson v. Staed,* 135 Mo. 135, at 139, 140, holding the right to be one of law and not of comity and that "the order of the court and the subsequent possession thereunder vested in the plaintiff a special property—which authorizes him to maintain this suit."

The question is of first importance when consideration is given to the many business enterprises which are being operated by receivers in these times of stress. The decision herein would deny such receiver the right to sue in a federal court in a sister state, in

the absence of ancillary proceedings, for the collection of debts owing the receiver on account of goods sold and delivered by him, or for the recovery or restoration of goods and chattels sent by or taken from him into such sister state, or to sue for their value if converted, or for damages sustained through negligence while the chattels were in the sister state.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6909, (IVAN OAKES, as Receiver, Appellant, v. BEN LAKE, as Sheriff of Owyhee County, Idaho, Appellee) and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

IVAN E. OAKES, Petitioner,
By JAMES G. WILSON,
JOHN F. REILLY,
GEO. B. GUTHRIE,
P. J. GALLAGHER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion of The Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit (Sawtelle J.) was filed January 9, 1933. It will be found in the *Transcript of Record* (R. 89-94). It is not yet in published form. No opinion was filed in the trial court.

Statement of Grounds of Jurisdiction

(*a*) The jurisdiction of this court is believed to be sustained under *Judicial Code,* Section 240, as amended by the Act of Feb. 13, 1925, 43 Stats. 938. The jurisdiction of the District Court below is laid under *Judicial Code, Section* 24, amended, 36 Stats. 1091, as a suit at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars and is between citizens of different States.

(*b*) The date of the judgment sought to be reviewed herein is January 9, 1933. (R. 94, 95).

(*c*) The nature of the case and rulings below were such as bring this case within the jurisdictional provisions relied upon. The action brought in the District Court was based on diversity of citizenship, plaintiff (petitioner) appearing as an Oregon citizen, who had been duly appointed an Oregon receiver of certain cattle (R. 11, 12), had taken them into his possession (R. 13) and was entitled to their immediate possession at the time the action was filed

(R. 13), against defendant an Idaho citizen and sheriff who held the cattle on an Idaho attachment and withheld possession (R. 12, 14) notwithstanding plaintiff's demand for their return. Defendant (respondent) by his Answer admitted that the cattle had been attached by him (R. 22) and alleged that he held them on a writ of execution (R. 23) and further declared that plaintiff as an Oregon receiver, had no capacity to sue herein (R. 25). The evidence showed plaintiff's Oregon citizenship (R. 32) and the value of the cattle to be in excess of $3,000.00 (R. 42, 67, 68). Defendant's Idaho citizenship was admitted by his Answer (R. 21).

The trial court dismissed the action on motion for nonsuit, based on plaintiff's lack of capacity to sue in Idaho (R. 74) and the Circuit Court of Appeals affirmed the judgment (R. 94). Its opinion (R. 88-94) holds that your petitioner, as plaintiff below, being an Oregon receiver, had no capacity to sue in Idaho (R. 91, 93); that he was not vested with the "title necessary to sue in the Court below without an ancillary appointment" (R. 93); although it was granted or assumed that as an Oregon receiver he was entitled to the undisturbed possession of the property, had actually had such possession and had the right to bring a replevin in Oregon. (R. 93). The opinion holds this case to come under the rule of *Booth v. Clark*, 17 How. (58 U. S.) 322, and later cases in this court (R. 91, 92). However, in none of those cases had the receiver taken possession of the chattels within the appointing State, nor did the court

express its opinion on the legal effect of such possession, nor have we found any other decisions of this court which touch the facts herein found.

The issuance of the mandate has been stayed pending the determination of this Petition for Writ of Certiorari by an order of Judge Wilbur signed January 30, 1933 (R. 96).

(*d*) Cases believed to sustain the jurisdiction of this court to review on certiorari the matters involved are:

Hale v. Allinson (1902), 188 U. S. 56.
Lion Bonding & Surety Co. v. Karatz (1922), 262 U. S. 77.
Grant v. A. B. Leach Co. (1929), 280 U. S. 351.
Moore v. Mitchell (1929), 281 U. S. 18.

STATEMENT OF THE CASE

On March 1, 1922, W. S. Skinner and his wife conveyed, by mortgage-deed of trust, their certain real estate in Malheur County, Oregon, including livestock thereon, unto Lumbermens Trust Company (corporate name later changed to Equitable Trust Company), intended and designed to secure the payment of certain bonds issued by the mortgagors. (R. 59). The mortgaged cattle approximated 700 head. (R. 59). The mortgagors breached the conditions of and defaulted in the payments required by the deed of trust, and possession of the ranch and cattle was turned over to the trustee-mortgagee,

whose representative was in charge (R. 38) at the time a foreclosure suit was begun by the trustee in the Circuit Court of the State of Oregon for Malheur County, March 17, 1931 (R. 62). At that time, the Honorable W. W. Wood, Circuit Judge of the State of Oregon, appointed your petitioner as receiver; the Order of Appointment (R. 15-20) was based on the trustee-mortgagee's application and the showing made by its bill of complaint (R. 59) whereby your petitioner was made receiver of

> "all the assets, (etc.) covered by said mortgage or deed of trust, and all their property real, personal and mixed, of every kind and nature covered by said deed of trust." (R. 17).

This order further required an approved bond to be given and filed by the receiver conditioned

> "that he will well and truly account for any and all moneys and properties coming into his hands as such receiver." (R. 17);

and further that the receiver be

> "empowered and directed to take immediate possession of all and singular the property, both real and personal, described in or subject to the said mortgage deed of trust . . . " (R. 17);

and further that

> "the receiver in operating, conducting and managing the business of . . . W. S. Skinner and Ella Skinner, is . . . . authorized and empowered to manage and operate the said property and business of the defendants where the same is a going concern in such manner as

will, in his judgment, produce the most satisfactory results;" (R. 19).

NOTE: The Order of Appointment is printed in full (R. 15-20) as an Exhibit to the Complaint below. This was denied in the Answer for want of sufficient information and belief. It is part of the judgment roll—Plaintiff's Trial Exhibit 1—referred to in the Bill of Exceptions (R. 62).

The receiver qualified and filed his bond the next day, March 18, 1931 (R. 62) and on March 28, 1931, visited the ranch (about eighty miles distant from petitioner's home at Ontario, Oregon) and presented his credentials (R. 33, 45). He inspected the premises, including about 100 head of the cattle thereabouts (R. 33, 38); was given a list of the cattle by the trustee's representative (R. 38) showing 141 head to be subject to the receivership. The cattle were then on the range in Malheur County, Oregon (R. 38, 39). The receiver thereupon arranged for the continued maintenance of the ranch, put a man in charge of the premises (R. 34, 46), arranged with the Skinners for the production of hay, permitting them to remain on the ranch and to pay as rental therefor a share of the hay grown (R. 52-54).

The Oregon sheriff's return showed service made on all defendants, and the default of W. S. Skinner and Ella Skinner was entered *pro confesso* as of April 24, 1931 (R. 57).

Later in the summer of 1931, and while the receiver's man was ill, the mortgaged cattle crossed the Oregon-Idaho state line and into Owyhee County, Idaho. The Skinner home ranch is located westerly

from the town of Jordan Valley (R. 42), which in turn is very close to the Oregon-Idaho state line.

The mortgaged cattle were seized by the sheriff of Owyhee County in July, 1931 (R. 23, 54) upon their coming into the State of Idaho, and being in the vicinity of the so-called Star Ranch (R. 48). The attachment suit was brought in the District Court of the State of Idaho for Owyhee County by one David Summerville and against W. S. Skinner (R. 23, 74). In this action neither the receiver nor the trustee was made a party. The seizure was made and subsequent writ of execution was levied by the sheriff as upon cattle belonging to and in the possession of W. S. Skinner and his employees (R. 22, 23). The receiver did not know the cattle were to be moved out of Oregon, nor did he give anyone permission to take them out of Malheur County (R. 54).

The receiver Oakes, made a written demand for the cattle (R. 56), which was ignored by the sheriff, who took them on a writ of execution (R. 23); and thereafter this action was brought by Oakes, as receiver, against Lake, sheriff, respondent herein, as defendant, in the United States District Court for the District of Idaho, Southern Division, sitting at Boise. The action was laid in claim and delivery under the Idaho statutes. At the trial of the cause and at the conclusion of plaintiff's testimony defendant's counsel moved for a "nonsuit", which the court granted, and on February 11, 1932, gave respondent a judgment thereon (R. 25).

It appears from the record that the respondent's motion was thus stated:

> "The defendant moves that the plaintiff be nonsuited, and dismissal entered, upon the ground and for the reason that the proof shows that plaintiff has no capacity to sue in the court of this state, inasmuch as he has neither title to the property under the Oregon law or the order of the court appointing him, nor had actual possession of the property, either in the State of Oregon or the State of Idaho, and second, on the ground that the action against the Sheriff, being an action in replevin, will not lie in the United States Court to take property from the possession of a state court. We have a number of authorities." (R. 74).

Thereafter and on March 5, 1932, a Motion for a New Trial was filed in petitioner's behalf (R. 26), which was on March 21, 1932, denied (R. 27), and thereafter and on June 17, 1932, an Appeal was allowed to the Circuit Court of Appeals for the Ninth Circuit (R. 29, 30) where the same was argued and submitted September 14, 1932 (R. 87) and an opinion thereafter filed January 9, 1933 (R. 88-94) and Decree entered of even date (R. 94) affirming the judgment and decree of the District Court below.

In its opinion, the Circuit Court of Appeals said:

> "We believe the judgment must be affirmed, on the ground, as stated in the Motion for a Nonsuit, that the receiver had no capacity to sue in the Court below." (R. 91).

And further:

> ". . . Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property, and assuming that he actually had such possession, and granting or assuming that he had the power to sue locally in replevin for an ulawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment; and he was not entitled to bring the suit as a matter of comity. *Great Western Mining Co. v. Harris*, 198 U. S. 561, 576." (R. 93).

The Court did not pass on the other ground stated —that of interference with defendant's possession as that of a State court. This case, however, does not involve seizure by the U. S. Marshal, no claim and delivery bond was given, and no conflict is now involved. The case is, under code practice, in any event, to be supported as in trover. *Porter v. Davidson*, 62 Fed. 626.

This Petition for a Writ of Certiorari seeks to review and correct what is believed to be substantial error in the opinion and judgment of the Circuit Court of Appeals.

SPECIFICATION OF ERRORS

Petitioner believes the Circuit Court of Appeals has erred herein:

1. In denying petitioner the right or capacity to

sue for the repossession or value of the cattle in the District Court below when it appears or is assumed:

(*a*) That petitioner had lawfully reduced the cattle to his actual possession in Oregon, and had as of right a possessory property and title to them;

(*b*) That as a managing receiver, petitioner had assumed control and taken possession of the cattle, and was lawfuly engaged in the operation of the former Skinner properties;

(*c*) That petitioner is individually and personally responsible, and is obliged under the conditions of his bond to account for properties coming into his possession in the administration of his trust as did these cattle;

(*d*) That petitioner was appointed managing receiver on the application of the chattel-mortgagee, who at the time of appointment held lawful title to and possession of the cattle under the Oregon Statute and decisions, and whose possessory rights were, by the order of appointment and surrender of possession, vested in your petitioner as such managing receiver;

2. In holding this controversy to be governed by *Booth v. Clark,* 1 How. 322, *Lion Bonding Co. v. Karatz,* 262 U. S. 77, *Sterrett v. Second National Bank* (1918), 248 U. S. 73, and *Great Western Mining Co. v. Harris,* 198 U. S. 561, in none of which cases was there before the court for determination, nor was the law expressed touching the possessory

property rights or title of a foreign receiver to goods and chattels which had been reduced to possession within the appointing State and thereafter brought, sent or taken into a sister State where said rights were to be adjudicated.

SUMMARY OF ARGUMENT

The controlling question is simply stated. An Oregon receiver, thereunto authorized, takes possession of cattle in Oregon. Thereafter the cattle cross the boundary into Idaho and are attached by a stranger as property of the insolvent. May the receiver recover the possession or value thereof, in the federal court sitting in Idaho, either as such receiver or in his own right?

We contend that having taken possession and assumed responsibility in Oregon, the receiver has vested in him a property right or title good against the world, excepting only his duty to account to the beneficiaries of his trust; that as a keeper in fact (as well as in law) he has possessory property rights, and the possessory remedies of the law, replevin, trover, trespass and detinue are his against the attaching stranger; that in seeking to recover the cattle or their value, he is not acting as the arm of the Oregon court nor is he executing an order of that court; he has already obeyed the court's order by taking possession of the cattle and reporting them in his inventory. In Idaho, he seeks the *repossession* of the cattle as distinguished from possession, and acts because of his personal responsibility and authority.

He may be said, as an operating receiver, to be entitled as such to possession of the cattle on the range in the adjoining county and state, but, in any event, he has, by virtue of his factual keepership, what Justice Holmes, referring to bailments, prefers to call a "possessory property" in the cattle which is sufficient to support the right to sue.

The ascribed reason, lack of "capacity to sue" is probably inapposite. He has a personal "right to sue", and the trial court need not concern itself as to the "receiver's capacity" relating to actions; (the receiver's "capacity" was exercised and enforced in Oregon when actual possession was accomplished) its only concern is whether, on the merits, petitioner, as plaintiff below, was "legally entitled" to the cattle. As we read the federal decisions (excepting only the opinion below) and the various State cases (save only one in California) and the available authors of standard text-books and cyclopedias, and compare and apply the analogies of foreign guardians, administrators, sheriffs, and all manner of bailees, finders, pledgees and borrowers, we learn that a receiver's possession, lawfully acquired in one state, is respected, recognized and enforced as of right in all others.

Besides, petitioner was personally responsible on his bond—*ex contractu*—whatever his liability to his court as an officer might be; and that bonded liability, added to his right of possession, gives a further property interest which is recognized everywhere.

Still further, the trustee-mortgagee had a title to

the cattle, as grantee-vendee under the conveyance, and, by virtue of Oregon's statute and decisional law, as well as actual possession at the time of the receivership order; and the court's order made on application of the trustee-mortgagee in possession, together with actual and symbolic surrender of possession of the cattle to the receiver, vested the receiver with the right and title of the trustee-mortgagee as a further transferee. Such a transfer in fact conveys a right in the property to petitioner who is at least the equivalent of a responsible bailee in possession, whose rights are everywhere recognized and supported.

There is nothing in the history of possessory remedies which denies petitioner's right to recover his lost possession in another jurisdiction; there is every practical reason why such "possessory property" rights should be everywhere enforced.

The suggested remedy through ancillary appointments is barren; it is manifestly impossible as to workability even if it were available as a legal right rather than a discretionary remedy; it would be giving a stone when one asks for bread.

ARGUMENT

POINT A.—PETITIONER HAD ACTUAL LAWFUL POSSESSION OF THE CATTLE IN OREGON. SUCH POSSESSORY "TITLE" OR "SPECIAL PROPERTY" IS RECOGNIZED AS OF RIGHT IN A SISTER STATE.

The very early common law first recognized the right to recapture chattels taken from the keeper as in a *form of action available only to the actual pos-*

sessor; the true owner, unless he were also the actual possessor, had no remedy against the stranger who took them but perforce must look to the possessor. This right was so well established that by the 13th century the law was settled that the actual possessor from whom the goods were taken, or by whom they were lost, was given his right to recover from the stranger or taker *because he—the keeper—was liable to the true owner*—an inverted reasoning. (Curiously enough the law had its beginning in the taking or stealing of cattle by a stranger.) Thereafter, when the true owner was given his direct remedy against the third party, the possessory rights and remedies of the keeper (bailee) remained, as they do to this day, in trespass, trover, replevin, etc.; and, from ancient times, all bailees have been entitled to these possessory remedies. And even a wrongful possessor has sufficient title for a trover or replevin against a stranger. The so-called "special property" referred to in modern cases as the basis of replevin, etc., is no more than a right of possession which has been disturbed, and it is a procedural legacy from ancient forms of action where the established verbiage required the use of certain possessory pronouns, and thus some differentiation from "general property" was thought necessary.

As to the foregoing, see *"The Common Law"*; Holmes (1881), Little, Brown & Co., Lecture V, pp. 165-167 et seq. and Lecture VI, pp. 241-243 et seq., where, with profound analysis, the author demon-

strates the origin of these rights. We quote from p. 243:

> "I have explained the inversion by which a bailee's right of action against third persons was supposed to stand on his responsibility over, although in truth it was the foundation of that responsibility, and arose simply from his possession. The step was short, from saying that bailees could sue because they were answerable over, to saying that they had the property as against strangers, or a special property, because they were answerable over, and next that they could sue because they had a special property and were answerable over. And thus the notion that special property meant something more than possession, and was a requisite to maintaining an action, got into the law."

See *U. S. v. Atlantic Coast Line*, 206 Fed. 190, 202, stating the common law basis of bailee's right to sue because of his responsibility over.

Accordingly we find that a receiver's title will sustain an indictment for larceny from the "owner." *State v. Rivers* (1882), 60 Iowa 381. In that case a receiver of farm property visited the farm, notified the tenants of his appointment, arranged with them for handling the crops leaving them on the premises. It was held that the tenant's possession was the receiver's possession and that such possession of the receiver (as in case of a bailee or pledgee) vested in him a "special property" respecting which the larceny indictment could be laid as for ownership.

In *Scott v. Elmore* (1877), 10 Hun (17 N. Y. Sup. Ct.) 68, 72, it was said:

> "Personal property is usually held by mere possession without any further evidence of title, and may be passed from hand to hand in the same way, and it is well enough to allow the title to that kind of property to vest in a receiver without any assignment, because he can take actual possession of it and dispose of it for the purposes of the trust: but real property is held by a very different tenure . . ."

In *Chillicothe Furn. Co. v. Revelle,* 14 F (2nd) 501 (C. C. A. 8), J. Sanborn held a symbolic delivery (key to safety deposit box) as sufficient to pass title to a receiver.

(a) **The Federal Decisions**

In *The Willamette Valley,* 66 Fed. 565 (C. C. A. 9) Judge Gilbert said (p. 567):

> "But if, upon the other hand, the receiver should first obtain the possession of said property before an attempt is made to subject the same to the payment of domestic debts, or if, as in this case, in the prosecution of the business which he is appointed to conduct, or otherwise, he should take any of the property of his trust into the foreign jurisdiction, his possession and right of possession will be respected in the foreign tribunal, even as against the rights of creditors there residing, who may attempt to subject the same to the satisfaction of debts created before the receivership. Chicago, M. & St. P. Ry. v. Keokuk Northern

> Line Packett Co., 108 Ill. 317; Pond v. Cooke, 45 Conn. 126; Cagill v. Woolridge, 8 Baxt., 580; Kilmer v. Hobart, 58 How. Pr. 452."

In *Chicago Bonding Surety Co. v. U. S.*, 261 Fed. 266 (C.C.A. 7), Judge Baker said, answering the contention that a Pennsylvania receiver could not sue in Illinois for the value of goods delivered therein (p. 268):

> "The receiver was appointed before anything had been furnished by the (insolvent) company. Thereafter all correspondence and transactions were between Shields and the receiver. So, even if this be regarded as the receiver's suit, it is seen that he is suing as the owner of an obligation for goods sold and delivered by him, and not as receiver of a chose in action belonging to the company. High on Receivers, p. 161; Alderson on Receivers, p. 760."

In *Jenkins v. Purcell*, 29 App. D. C. 209, the court held (in a case where a Virginia receiver was possessed of cattle in Virginia which he brought into the District of Columbia and sold) that the receiver had a possessory title and could assert it in the District of Columbia courts and that nothing in *Booth v. Clark* was opposed to such right, citing the same cases found above in Judge Gilbert's opinion.

Later opinions of that court have confirmed the holding. See *Union Sav. Bank v. Carnegie Trust Co.* (1911), 37 App. D. C. 551, and *Lyon v. Russell* (1914), 41 App. D. C. 559, the latter expressly

touching on the receiver's title. There are a number of decisions in the District Courts in accord.

Holding to the contrary, we find the opinion herein to stand alone among the decisions of the different Circuit Courts of Appeals and to be in opposition to Judge Gilbert's opinion in this circuit. Clearly there is a conflict in the decisions.

(b) Other Decisions and Authorities

The cases already cited in our *Petition for Writ of Certiorari* at pages 4, 5, 6, supra, show the leading cases on the precise question, which were followed in *The Willamette Valley*, 66 Fed. 565, and *Jenkins v. Purcell*, 29 App. D. C. 209.

We also cite *Goodrich Conflict of Laws*, p. 445 (West Publishing Co., 1927):

> "A receiver is appointed to take charge of the property and business of a concern. He does so and in the course of running the business or disposing of the assets, he sends or takes some of the property to another state. If the possession of the receiver in another state is interfered with, it is clear that he may maintain an action in that state in defense of his right to possession. Further he may assert his right to possession as against a creditor who seeks to attach the property for a claim against the concern for whom the plaintiff was appointed receiver (citing Pond v. Cooke, 45 Conn. 126; 29 Am. Rep. 668; Jenkins v. Purcell, 29 App. D. C. 209, 9 L. R. A. (N.S.) 1074; Chicago, M. & St. P. Ry. Co. v. Keokuk

Northern Line Packet Co., 108 Ill. 317; Woodhull v. Farmers Trust Co., 11 N. Dak. 157, 90 N. W. 795; Somerset Coal Co. v. Diamond State Steel Co., 224 Pa. 217, 73 Atl. 442, 132 Am. St. Rep. 775; Cagill v. Woolridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716, Contra—Humphreys v. Hopkins, 81 Cal. 551, 22 P. 892). His right to possession for the purpose of carrying out the objects of his appointment will be recognized in the second state like any other duly vested right. In the language of the Missouri Court: 'It is generally ruled that, after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected in whatever jurisdiction the property may thereafter be taken by the receiver. Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. Rep. 569."

We also refer to Prof. Jos. H. Beale, an eminent authority on Conflict of Laws, who in his *"Beale on Foreign Corporations"* (1904, W. J. Nagel, Boston), analyzes *Booth v. Clark* (pp. 965, 966) and states that a foreign receiver may recover possession of goods fraudulently removed therein from the appointing state; and again (p. 970) shows the right to recover as a statutory successor (to the corporation); and (p. 971) as holder of title by voluntary (or common-law) assignment; and further (p. 972) as one "legally entitled" to the property, in which class he places indebtedness owing to the receiver himself as

in operating a business, judgments already secured in litigation prosecuted by him, and adds (p. 973):

> "And whenever a receiver gets actual possession of assets by order of court, the possession will not be divested in another jurisdiction." (Citing cases hereinabove relied upon.)

If we apply to the case at bar, the reasoning of Judge Coxe in *Wilkinson v. Culver*, 25 Fed. 639, (relating to title to judgments) we submit that petitioner herein showed or exercised his Oregon right of possession when he took possession and control of the cattle in Oregon. He exerted (or proved) his "title as receiver" at that time and acquired a new and different title as possessor and responsible keeper. He has no need of exerting or proving his right as receiver a second time.

(c) Analogies Are in Accord

The important case of *Crapo v. Kelly*, 16 Wall. (83 U. S.) 610, must not be passed by. Therein a Massachusetts State insolvency proceeding resulted in the appointment of an assignee by the court—not a voluntary assignment—by virtue of which order the assignee was held to take title to the properties within Massachetts without more, and this included title to a vessel on the Pacific ocean at the time. This vessel was attached by a New York creditor on arrival in New York (it had not returned meanwhile to Massachusetts) but the assignee's title was held entitled to prevail over the attachment. When we remember that title by such state assignment—as distinguished from

a voluntary or common-law assignment—is not entitled to recognition in a sister state when tested by a creditor therein (*Sec. Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 635; *Barnett v. Kinney*, 147 U. S. 476, 481), we believe the case should be determinative of a foreign receiver's title and the right to enforcement in a sister state, he being no less an officer of the court than such assignee; and where actual, rather than constructive possession is involved, as in the case at bar, the receiver's right should be stronger.

A *sheriff* is a court officer who has only possessory rights to goods attached by him, yet, where the goods were taken by him into another state and put in hands of a keeper, from whom they were taken by a stranger, the sheriff may maintain trespass against the stranger by reason of his "special property". *Brownell v. Manchester* (1822), 1 Pick (Mass.) 232; and the keeper may have his action under identical circumstances. *Utley v. Smith* (1835) 7 Vt. 154.

Analogies drawn from *foreign administrators* under the same circumstances of possession and removal are in accord, even though there be an ancillary administrator appointed by the State to which the property has been removed. See *Hill v. Barton* (1916), 194 Mo. App. 325, (cattle brought by a Texas administrator into Missouri); *Chamberlin v. Wilson* (1876), 45 Iowa 149, (promissory note brought into Iowa for action by a Nebraska administrator), and *Giddings v. Green* (1880), 48 Fed. 489, (Ohio administrator allowed to enforce a vendor's lien on Virginia realty).

A *finder* of property may have replevin against a stranger to the title. *Durfee v. Jones* (1877), 11 R. I. 558, and a *wrongful possessor* has a similar right against strangers. *Holmes: Common Law*, p. 242, citing authorities.

A *depositary* has a "special property" and so has a *borrower*. Theirs is simply a possessory right, but it will be good against strangers and support replevin or trover. *Holmes: Common Law*, p. 243; *Story: Bailments*, p. 280; *Harker v. Dement* (1850), 9 Gill (Md.) 7.

The gist of the matter lies in whether the petitioner's right to the cattle, after having reduced them to lawful possession in Oregon, is a "title" which should be recognized in a sister State. If the possessory right so acquired is a title—a "special property" in the cattle—it should be recognized as of right everywhere; and, historically, as demonstrated by Holmes J. in his *Common Law*", that is precisely the property right —mere possession—upon which the courts based the so-called "special property" generally held to be sufficient in dignity and quality as to command possessory remedies if the property were lost, and everywhere enforced except as against the true owner only.

Besides that, and because of his bond, petitioner has a further interest than that of mere possession; and if so-called "special property" or "necessary title" requires for support more than possession, that liability should supply it.

POINT B. — PETITIONER, AS A MANAGING RECEIVER, IS AND WAS LEGALLY ENTITLED TO THE CATTLE'S POSSESSION, OR THEIR VALUE, IF CONVERTED, NOTWITHSTANDING THEIR HAVING GONE OUTSIDE THE STATE OF OREGON.

Chicago Bonding & Surety Co. v. U. S., 261 Fed. 266.
The Willamette Valley, 66 Fed. 565.
Merchants Nat. Bank v. Penna. Steel Co., 57 N. J. L. 336.
Pond v. Cooke, 45 Conn. 126.
Robertson v. Staed, 135 Mo. 135.
Lyons v. Russell (1914) 41 App. D. C. 559.
Woodhull v. Farmers Trust Co., 11 N. Dak. 157.

All the above cases were concerned with managing and operating receivers, in the course of whose business it was expedient to send or take the goods outside the appointing state. As the New Jersey Court has said in *Merchants Nat. Bank v. Penna. Steel Co.* (supra) quoting from *Wilkinson v. Rutherford* (1887), 49 N. J. L. 244:

> "I cannot agree to the doctrine that a receiver is a mere custodian of the property of the person whom, in certain respects, he is made to supplant; for it would seem that he is an assignee of the assets within the scope of his office. There seems to be no reason why his power should not be co-extensive with his functions; and it is clear that he could not perform these functions unless upon the theory that some interest in the property, akin to that of an assignee, passes to him."

In *Cagill v. Wooldridge,* 8 Baxt. (Tenn.) 580, the court said:

> "But where the court of a sister State, having jurisdiction of the parties and subject-matter, and having the property within its actual control, appoints a receiver to take possession of and sell the property, and this order is executed by the property being actually taken into possession by the receiver, we think beyond doubt this would give to the receiver against the parties to the litigation, and those claiming through them, a special property and right of possession that would enable him to maintain an action of replevin, and that this right would not be lost by sending the property to this State for sale. To this extent we would respect the orders and judgment of the courts of sister States. The receiver can, in such case, maintain the action in his individual capacity."

In *Pond v. Cooke,* 45 Conn. 126, the court said:

> "But when property has once vested in a trustee, assignee or receiver, by the law of the State where the property is situated, it makes no difference whether it is done under the local law of the State or under the common law. The law of another State will not divest the trustee, assignee or receiver of his right to the property, should he take it into such State in the performance of his duty. The courts of such State will inquire whether he has such right to the property when it comes into the State as between himself and their own citizens, but when the fact that he has such right is ascertained, they will not regard it as important by what mode the right was acquired."

And the Supreme Court of Illinois said in *C. M. & St. P. Ry. v. Keokuk Packet Co.*, 108 Ill. 317:

> "The receiver was by his appointment authorized to manage the affairs of the corporation under the orders of the court. The business of the corporation was running boats on the Mississippi river, and chartering a barge for a trip up that river was but continuing the employ of the barge in the business of the corporation, and therefrom making an increase of the assets to be distributed among the creditors. . . . By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver, and it is the established rule that where a legal title to personal property has once passed and become vested in accordance with the law of the State where it is situated, the validity of such title will be recognized everywhere. (Citing cases). Under this rule we hold that where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment which he was appointed to take charge of, he will not be deprived of its possession, though he take it, in the performance of his duty, into a foreign jurisdiction; that while there it cannot be taken from his possession by creditors of the insolvent debtor who reside within that jurisdiction."

Importance of Issues

Petitioner herein was a managing receiver with extensive powers in operating the Skinner ranch. It

would be practically impossible to operate such a ranch near a State boundary so as to prevent cattle from passing across the line.

Most of our metropolitan centers are located near State boundary lines. If the decision below is to stand unmodified, this and many other receiverships will be embarrassed; and properties taken into sister States, and debts therein owing to the operating receiver, may be seized with impunity by unsatisfied creditors of the insolvent. The question, at the present time, with numerous receiverships in operation, is of vital importance. The designation of your petitioner as receiver may be considered as *descriptio personae*. (*McBride v. Oriental Bank*, 200 Fed. 895).

POINT C.—PETITIONER HAS "SPECIAL PROPERTY" BECAUSE OF HIS PERSONAL AND BONDED LIABILITY FOR THE CATTLE.

The record shows the receiver's bond to require an accounting for property taken into his possession (R. 17) and the cattle were so inventoried (R. 58).

As a keeper-bailee, petitioner had the possessory remedies against strangers everywhere as already shown.

A *servant* may have replevin if he must account for the property taken into his actual possession. (*Harris v. Smith*, S. & R. (Pa.) 23).

A receiver's bond is recognized as an independent liability, enforceable against the receiver and his sur-

ties in a separate action in courts other than the cause and court of the receivership. See discussion and legal history of such in opinion of Taft, J., in *Kirker v. Owings* (1899), 98 Fed. 499, 506 (C.C.A. 6).

The receiver, having the obligation to account for the property, cannot successfully show as an excuse or defense, that the property has been attached in another state. His liability was fixed by virtue of his Oregon possession. *Osgood v. Maguire,* 61 N. Y. 524.

Were the petitioner herein compelled to pay for the value of the cattle on his accounting, whether by summary proceedings, or on judgment secured in an action on the bond, he would clearly be entitled to the cattle under rights of subrogation. See *Fogg v. Hebdon,* 80 Miss. 750, 32 So. 285; *Bank of Midland v. Harris,* 114 Ark. 344, 170 S. W. 67, and *Goodrich v. Rochester Trust Co.,* 160 N. Y. S. 454, declaring subrogation rights of tax collector, county treasurer and foreign administrator respectively, where fiduciary has personally discharged the obligation involved.

POINT D.—PETITIONER HAS "TITLE" AS TRANSFEREE FROM AN OREGON CHATTEL-MORTGAGE.

An Oregon statute, unchanged since enactment in 1866, now found *Oregon Code 1930,* Sec. 54-207, reads as follows:

> "Whenever the condition of any mortgage of goods and chattels shall be broken, the mortgagee shall be entitled to the immediate possession of the mortgaged property, and when after breach of the condition of any such

> mortgage the possession of the mortgaged property shall not be delivered up to the mortgagee upon demand by him or by any person duly authorized by him to make such demand of the person or persons having such mortgaged property in possession, the mortgagee may recover the possession of such mortgaged property in the manner provided by chapter III of Title IV of the Code of Civil Procedure."

The reference in the statute to Chapter III, Title IV, is the Claim and Delivery Chapter of the Oregon Code.

From the time of this enactment, the Oregon cases have held that, on condition broken, the chattel-mortgagee had title to the goods and might sue in claim and delivery. *Moorhouse v. Donaca,* 14 Or. 430, 441; *Case Threshing Co. v. Campbell,* 14 Or. 460, 466; *First Nat. Bank v. Yocum,* 96 Or. 438.

A showing of mere possession is sufficient to support trover by a chattel-mortgagee. *Harvey v. Lidvall,* 48 Or. 558.

An Oregon receiver has a possessory right to the insolvent's property. *Neppach v. Beauvais* (1932), 138 Or. 524, 528.

The Skinners, by their deed of trust, for valuable consideration, had clothed the trustee with a property right, which, on default, became a possessory title. There was no title in W. S. Skinner to be attached.

The chattel mortgagee-trustee herein, having title, gave over its possession and surrendered the cattle to

petitioner. The transference was actual. Under the Idaho cases, the chattel-mortgagee's title would be respected in Idaho as against Idaho creditors of the mortgagor. *Cont. Nat. Bank v. Naylor* (1924), 39 Ida. 267. No good reason occurs to us, nor has any been suggested by others, why the transferee of the mortgagee-trustee should have less right or recognition.

Ancillary Proceedings Inadequate

In its opinion (R. 93. 94) the court below refers to petitioner as having no right to recover unless after ancillary appointment in Idaho. This is, of course, not a right; it is only discretionary whether ancillary proceedings may be had; and such may be refused. See *"Beale on Foreign Corporations"*, Sec. 791, p. 961, citing cases, including *Farmers L. & T. Co. v. Chi. & A. Ry.*, 27 Fed. 146, 158.

As a practical matter—and one of the glories of the common law is its common sense—the right to ancillary receivership, even if compulsory, would be a barren remedy. Consider the active movement of goods being shipped hourly from one state to another, or, as in the range country, as here involved, that cattle or sheep in southeastern Oregon must be driven to market and rail-head in either Nevada or Idaho, and the practical impossibility of a managing receiver to perform his duty without fatal embarrassment becomes evident. Happily the law of possessory remedies has never denied the lawful possessor the right to follow his chattels, and until the decision below, no Federal court, to our knowledge, has so spoken.

CONCLUSION

We respectfully submit that we have disclosed: (a) Conflict between the decision of the Court below and decisions of other Federal Courts; (b) no controlling decision by the Supreme Court; (c) the clear weight of authority to be opposed to the decision reached below as a matter of general law; (d) probable error in the decision below as a question of Federal law; and (e) the importance of questions involved and need of a decision of the Supreme Court settling the Federal law relating thereto.

We believe that this case calls for the exercise by this Honorable Court of its supervisory powers in order that petitioner may be permitted to present and try to conclusion on the merits, his cause in claim and delivery in the United States District Court for the District of Idaho, for the repossession or value of the cattle involved, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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